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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

STATE OF NEW JERSEY; BRENDAN T. BYRNE as Governor of the State of New Jersey; DEPARTMENT OF LAW AND PUBLIC SAFETY; JOHN J. DEGNAN as Attorney General of the State of New Jersey; EXECUTIVE COMMISSION ON ETHICAL STANDARDS; ANGELO BIANCHI, RICHARD MOUNT, WARREN SMITH, JACOB TAPOREK, EDWARD HOFGESANG and JOAN HABERLE as members of the Excutive Commission on Ethical Standards,

Petitioners,

v.

MARIJANE SINGER, JUDD LEVY, MARTIN BRODY, EDWARD A. JESSER, JR., ROBERT F. KELLEHER, FRANK K. KELEMAN, HARVEY MOSKOWITZ, LEONARD SCHWARTZ, FRED R. SULLIVAN, CARLETON A. HOLSTROM, EDWARD KRAMER and MAGDA S. LEUCHTER,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Counter-Statement of Questions Presented

Whether certiorari should be denied in this matter because no award of attorney's fees has yet been determined or made under 42 U.S.C. §1988.

Whether plaintiffs-respondents who prevail in challenging a New Jersey law on federal constitutional grounds and in obtaining a final judgment declaring the law unconstitutional and enjoining its enforcement, are entitled to judgment under 42 U.S.C. §1983, and to attorney's fees under the "Civil Rights Attorney's Fees Awards Act of 1976", 42 U.S.C. §1988, even though defendants-petitioners, who possessed the authority and duty to enforce the unconstitutional law, had not yet taken action to enforce that law.

Whether there are no "special circumstances" which would render an award of attorney's fees under 42 U.S.C. §1988 "unjust" in this case, where defendants-petitioners possessed the authority and duty to enforce the unconstitutional law and defended that law, but had not yet taken action to enforce it as to plaintiffs.

Interested Parties

The parties identified in the caption of the Petition for Certiorari as well as in the caption of this Brief in Opposition to Petition for Certiorari are the interested parties.

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Respondents rely upon the Appendix submitted by petitioners, subject to the objection that much of that Appendix is not in the record of this matter below.

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NO. 20,064

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

STATE OF NEW JERSEY, *et al.*,

Petitioners,

v.

MARIJANE SINGER, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

Opinions Below

The opinions below are accurately set forth in Petitioners' Appendix as J (78a to 84a), L (88a to 92a), and M (93a to 109a).

Jurisdiction

Petitioners have not met, and cannot meet, their burden under Supreme Court Rule 17.1(b) and (c), because petitioners have failed to demonstrate that the decision of the New Jersey Supreme Court in this matter is inconsistent with any decision of this Court or of the Courts of Appeals, and because this Court has recently decided the questions of law upon which the New Jersey Supreme Court relied. *See* pages 5-17 *infra*. Therefore, this Court should deny the Petition.

Moreover, there has not been any award to the prevailing parties (respondents) in this matter under 42 U.S.C. §1988. Proceedings on remand from the New Jersey Supreme Court have not been concluded, and the Petition therefore seeks interlocutory review. This Court should not grant review on writ of certiorari before the findings of fact and dollar amounts as to respondents' section 1988 application have been reduced to a court order, and before either or both sets of parties have exhausted their rights to judicial review in the Courts of New Jersey.

Statutes Involved

The statutes involved, 42 U.S.C. §1983 and 42 U.S.C. §1988, are accurately set forth in the Petition, at 2-3.

Counter-Statement of the Case

The New Jersey law that respondents successfully challenged below was P.L. 1980, c.79. *See* Appendix A. Immediately prior to the July 29, 1980 effective date of that law, over 185 unpaid citizens who then served part-time

on various public boards and commissions were forced to resign their offices in order to avoid the onerous provisions and penalties of that law. *Singer* v. *State,* 95 N.J. 487, 490, 472 A.2d 138, 139 (1984) (Appendix M at 95a). Ten of the individuals who resigned, and two others who did not resign and consequently suffered the imposition of the law's burdens, filed the Complaint in this matter on August 28, 1980. *See* Appendix G, H.

The eight individual defendants named in and served with the seven-count Complaint were described by the Complaint as being charged with the authority and duty to enforce the challenged law. Appendix G ¶¶ 14-22. Petitioners admitted those allegations in their Answer. Appendix I ¶ 1. Petitioners continue to admit the authority and duty they had to enforce the challenged law. Petition at 15-16. The provisions of that law applied immediately, automatically, and without exemption. Appendix A. Petitioners also admit that persons found guilty of violating the law were subject to criminal prosecution and to suspension from public office. Petition at 4.

Counts I and II of the Complaint challenged the law under the Constitution of the United States. Counts III and IV challenged the law under the Constitution of New Jersey. The trial court entered judgment in favor of plaintiffs-respondents on all four of those counts. Counts V and VI challenged the law under the federal Civil Rights Act, 42 U.S.C. §1983. The trial court entered judgment against plaintiffs-respondents on those two counts, but that portion of the judgment was *reversed* on appeal by the Appellate Division of the Superior Court of New Jersey. Appendix L. The New Jersey Supreme Court *affirmed* the Appellate Division's decision. Appendix M. Count VII of the Complaint, which presented a cause of action for common law breach of contract, is not now in issue.

The trial court awarded to plaintiffs-respondents all of the relief they sought in their Complaint: the law was declared unconstitutional on its face and as applied; defendants were enjoined and restrained from taking any action to enforce the law; and any actions defendants had taken to enforce the law were declared null and void. Appendix K. Despite plaintiffs-respondents' prevailing party status, the trial court refused to entertain their application for attorney's fees and costs under 42 U.S.C. §1988. Appendix K. The Appellate Division *reversed* that portion of the judgment which denied a section 1988 award to plaintiffs-respondents as prevailing parties. That Court followed *Maher* v. *Gagne,* 448 U.S. 122 (1980), and held that a section 1988 award to the prevailing plaintiffs was in order even if the erroneous adverse judgment entered by the trial court on the section 1983 counts of their Complaint were not also being reversed. In addition, the Appellate Division followed *Supreme Court of Virginia* v. *Consumers Union of the United States, Inc.,* 446 U.S. 719 (1980), and held that plaintiffs-respondents were in fact entitled to favorable judgment on their section 1983 counts, thus entitling the prevailing plaintiffs to a section 1988 award for a second reason. Appendix L.

The New Jersey Supreme Court affirmed the Appellate Division as to both parts of the judgment on which the trial court had been reversed. Appendix M. The Petition, at 8, wrongly implies that the New Jersey Supreme Court held a section 1988 award to be appropriate only on *Consumers Union* grounds. The decision, however, is clearly based on *Maher* grounds as well, independent from the *Consumers Union* grounds. 95 N.J. *supra,* at 494-496, 472 A.2d *supra,* at 141-142 (Appendix M at 99a-102a).

Petitioners' "Statement of the Case" is misleading and erroneous in three other essential ways. First, there has been no award of attorney's fees or costs to the respond-

ents, who were the prevailing parties plaintiff below, and so the dollar amount sought in the application under 42 U.S.C. §1988 is irrelevant to the Petition. Second, most of petitioners' "Statement of the Case" draws on material that is not in the record below, including the exposition of alleged reasons why the patently unconstitutional law was enacted and why Governor Brendan T. Byrne failed to veto it. The material found in Petitioners' Appendices C, D, E and F is not in the record below. Third, petitioners did not appeal the judgment entered by the trial court that the state law was unconstitutional and that its enforcement was enjoined. The merits of the unconstitutional law therefore are not now in issue, and it is improper and irrelevant for petitioners now to construct and assert any redeeming features for that law.

ARGUMENT

This Court should not grant certiorari because this matter is not ripe for review and because the New Jersey Supreme Court's decision in this matter is consistent with recent decisions of this Court.

The Petition is nothing more than another tactic in petitioners' continuing classic deep-pocket defense to the prevailing parties' application for attorney's fees and costs held to be proper under 42 U.S.C. §1988 by the New Jersey Supreme Court. Although this Court in *Hensley* v. *Eckerhart*, —— U.S. ——, 76 L.Ed.2d 40 (1983), cautioned that "[a] request for attorney's fees should not result in a second major litigation", —— U.S. at ——, 76 L.Ed.2d at 53, petitioners have already succeeded in delaying the section 1988 award for nearly four years. As four Justices observed in their concurring opinion in *Hensley*:

> "Defendants—who generally have deeper pockets than plaintiffs or their lawyers, and whose own lawyers may well be salaried and thus have lower opportunity costs than plaintiffs' counsel—have much to gain simply by dragging out litigation."
>
> "The more obstacles that are placed in the path of parties who have won significant relief and then seek reasonable attorney's fees, the less likely lawyers will be to undertake the risk of representing civil rights plaintiffs seeking equivalent relief in other cases."

—— U.S. at ——, 76 L.Ed.2d at 64-65.

The issues raised by the Petition are interlocutory in nature as to this matter, and have been recently decided in respondents' favor by this Court. Review by this Court therefore is not warranted under Supreme Court Rule 17 or otherwise.

A. There has been no award of attorney's fees to the prevailing parties as yet, because the proceedings on remand from the New Jersey Supreme Court have not been completed.

The New Jersey Supreme Court did not review a lower court's award or make its own award of attorney's fees and costs in this case. *Singer* v. *State,* 95 N.J. *supra,* 472 A.2d *supra* (Appendix M). That Court held only as follows:

> "In conclusion, we determine that plaintiffs in this case are entitled to an award of attorney's fees under section 1988. Further, the matter is remanded for a determination of reasonable fees under section 1988 in accordance with the guidelines set forth in this opinion."

95 N.J. at 501-502; 472 A.2d at 145 (Appendix M at 108a).

Petitioners' reference to the dollar amount of the fee application, Petition at 3, or to the identity of state officials who would be liable for an award, Petition at 9, 19, or to an asserted "financial drain" upon "the State Treasury", Petition at 9, 19, are all premature. The Petition is interlocutory, because this Court can do no more than speculate about the amount of or justifications for the section 1988 award to be made in the New Jersey courts on remand; about the identity of state officials who may be liable, the amount of their individual liability, or the extent of their indemnification by the State of New Jersey; and about impact of any award upon the State Treasury.

B. Respondents are entitled to an award of attorney's fees under 42 U.S.C. §1988, because they were the prevailing parties and met the prerequisites for such an award.

The Appellate Division of the Superior Court of New Jersey, Appendix L, and the New Jersey Supreme Court, Appendix M, both found two independent reasons for reversing the appealed portion of the trial court's judgment. The reasons were (a) that plaintiffs-respondents were entitled to an award under section 1988 as prevailing parties on their federal constitutional counts, even if they had not obtained a favorable judgment on their section 1983 counts, under *Maher* v. *Gagne, supra;* and (2) that plaintiffs-respondents were entitled to a favorable judgment on their section 1983 counts under *Consumers Union, supra,* and therefore were for a second reason entitled to a section 1988 award. *See* Appendix L (90a); 95 N.J. *supra,* at 493-496, 472 A.2d *supra,* at 141-142 (Appendix M at 99a-102a).

1. Plaintiffs-Respondents prevailed within the meaning of 42 U.S.C. §1988 even if they had not obtained favorable judgment on the 42 U.S.C. §1983 counts of their Complaint.

This Court and the Courts of Appeals have held repeatedly that a favorable final judgment on a section 1983 count of a Complaint is not an essential predicate to an award of attorney's fees under section 1988. *Maher* v. *Gagne,* 448 U.S. 122, 129 (1980); *Hanrahan* v. *Hampton,* 446 U.S. 754, 756-757 (1980); *Gurule* v. *Wilson,* 635 F.2d 782 (10th Cir. 1980); *Smith* v. *University of North Carolina,* 632 F.2d 316 (4th Cir. 1980); *Oldham* v. *Ehrlich,* 617 F.2d 163 (8th Cir. 1980); *Ross* v. *Horn,* 598 F.2d 1312 (3d Cir. 1979), *cert. denied,* 448 U.S. 906 (1980). All that is necessary to support a section 1988 award is for a party to have prevailed in obtaining the essential relief sought by litigation in which a substantial section 1983 claim was pursued. *Maher* v. *Gagne, supra,* 448 U.S. at 130-131.

Maher upheld a section 1988 award against a state government in a case that had been settled without any judgment favorable to plaintiffs. This Court endorsed the District Court's decision that:

> "respondent was the 'prevailing party' within the meaning of §1988 because, while not prevailing 'in every particular', she had won 'substantially all of the relief originally sought in her complaint' in the consent decree."
>
> ". . . [R]espondent was entitled to fees under the Act because, in addition to her statutory claims, she had alleged constitutional claims that were sufficiently substantial to support federal jurisdiction under the reasoning of *Haguns* v. *Lavine,* 415 U.S. 528."

448 U.S. at 127. This Court went on to explain why a section 1988 award was appropriate despite the trial court's failure to render judgment in plaintiff's favor under section 1983:

> "Nothing in the language of §1988 conditions the District Court's power to award fees on full litigation of the issues or on a judicial determination that the plaintiff's rights have been violated. Moreover, the Senate Report expressly stated that 'for purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief.' "

Id. at 129. This Court's concluding statement is especially noteworthy in the present case:

> "Congress was acting within its enforcement power in allowing the award of fees in a case in which the plaintiff prevails on a wholly statutory, non-civil-rights claim pendent to a substantial constitutional claim or in one in which both a statutory and a substantial constitutional claim are settled favorably to the plaintiff without adjudication."

Id. at 132.

Maher v. *Gagne* recognized that Congress had required in section 1988 only an "action or proceeding to enforce a provision of sections 1981, 1982, 1983 . . . .", and not a favorable judgment *on* section 1983 grounds. This Court did not even require plaintiffs to prevail on their federal constitutional claims. *Id.* at 129, n.11. They simply had to allege constitutional claims "sufficiently substantial to support federal jurisdiction", *id.* at 129, n.10, and to win "substantially all of the relief originally sought", *id.* at 127, in order to become entitled to a section 1988 award.

Petitioners would torture section 1988 in an effort to make it read:

> "In any action or proceeding to enforce . . . §1983 . . . the court, in its discretion may allow the prevailing party [except one who obtained adverse judgment on its §1983 claim] . . . a reasonable attorney's fee as part of the costs." (inserted words are in brackets).

Of course, section 1988 does *not* so read because the words within the brackets are *not* in the statute. Petitioners ignore this Court's analysis of sections 1983 and 1988 in *Maher* v. *Gagne, supra,* preferring instead to discuss briefly *Luria Bros. & Co., Inc.* v. *Allen,* 672 F.2d 347 (3d Cir. 1982). Plaintiffs there had lost on all of their federal claims, and had won only on their state claims. This Court in *Maher* v. *Gagne, supra,* held it critical to a section 1988 award absent a favorable section 1983 judgment that "the constitutional issues remained in the case until the entire dispute was" ended. 448 U.S. at 131. In the instant case, as in *Maher* and unlike in *Luria,* "the constitutional issues remained in the case. . . ." In fact, plaintiffs-respondents prevailed on all of their federal claims, Counts I, II, V and VI, and so were entitled to fees and costs under *Maher* and even under *Luria.*

Section 1988 does not require either a favorable section 1983 judgment or avoidance of an unfavorable section 1983 judgment because "§1983 by itself does not protect anyone against anything." *Chapman* v. *Houston Welfare Rights Organization,* 441 U.S. 600, 617 (1979). It has a "procedural character" and "served only to ensure that an individual had a cause of action for violations of the Constitution". *Id.* This Court in *Maher* v. *Gagne, supra,* explained further the nature of section 1983:

> "Inasmuch as it does not create substantive rights at all, but merely provides a remedy for the viola-

> tion of rights conferred by the Constitution or other statutes, §1983 does not fall within the category of statutes providing for equal rights or civil rights. . . . [Section] 1988 provides that attorney's fees may be awarded to the prevailing party 'in any action or proceeding to enforce §1983'. Although the reference to actions 'to enforce' §1983 is somewhat imprecise in light of the fact that §1983 does not itself create substantive rights, the legislative history makes it perfectly clear that the Act was intended to apply in any action for which §1983 provides a remedy."

448 U.S. at 129, n.11.

Chapman and *Maher* establish that section 1983 is "procedural". Those and other decisions encourage a reluctance to decide on constitutional grounds matters which can be decided on narrow federal or state grounds. *Maher* thus held the sole relevant determination under section 1988 to be whether or not plaintiffs prevailed in vindicating their federal rights. 448 U.S. at 129. As the trial court, Appellate Division, and New Jersey Supreme Court all recognized, plaintiffs-respondents prevailed here because they vindicated important rights protected by the Constitution of the United States, and obtained all of the injunctive and declaratory relief they had sought as to each of the petitioners. Moreover, the Appellate Division and Supreme Court awarded judgment to plaintiffs-respondents on their section 1983 counts.

2. *Plaintiffs-respondents were entitled to the judgment which has been entered in their favor on the 42 U.S.C. §1983 counts of their Complaint.*

The Appellate Division of the Superior Court of New Jersey and the New Jersey Supreme Court both *reversed* that portion of the judgment entered by the trial court which denied to plaintiffs-respondents favorable judgment on their section 1983 counts. Both courts held that the essential elements of a section 1983 cause of action were established by (a) a determination that a state law violated the Constitution of the United States, combined with (b) an admission that defendant state officials were charged with the authority and duty to enforce that unconstitutional law, and with (c) the resignations of hundreds of officials from public office in order to avoid burdens that the law imposed automatically and immediately upon its effective date. *See* Appendix L, M.

Petitioners now present two fallacious arguments: (a) that declaratory relief may not be awarded under section 1983, so that a declaratory judgment issued on federal constitutional grounds will not support an application under section 1988, Petition at 11; and (b) that no legal or equitable relief may be awarded under section 1983 against state officials who admit possessing the authority and duty to enforce an unconstitutional state law, unless the defendants have personally engaged in affirmative conduct to enforce the law and to deprive a plaintiff of a constitutional right. Petition at 15.*

---

* Petitioners confuse section 1983 liability for damages with liability for declaratory and injunctive relief, as they did below. The cases Petitioners cite at 14-15 have no bearing upon the points at issue in this matter because they focus either upon whether a pri-

(Footnote continued on following page)

Supreme Court of Virgina v. *Consumers Union of the United States, Inc.*, 446 U.S. 719 (1980), disposed of both of petitioners' arguments in a case which was factually and legally identical to the instant one. Pursuant to its inherent and statutory authority to discipline members of its Bar, the Virginia Supreme Court "promulgated the Virginia Code of Professional Responsibility." 446 U.S. at 721. The Virginia Court was found to "have enforcement authority beyond that of adjudicating complaints filed by others. *Id.* at 724. When the Consumers Union attempted to compile a directory of attorneys, many attorneys refused to provide necessary data "for fear of violating the Bar Code's strict prohibition against attorney advertising". *Id.* Consumers Union brought a section 1983 action against the Virginia Supreme Court, the Virginia State Bar, the American Bar Association, the Chief Justice of Virginia, the President of the State Bar Association, and the Chairman of the State Bar Association's Legal Ethics Committee.

> "With respect to the Virginia Court, the complaint identified its chief justice and alleged only that the court had promulgated the Bar Code. The other defendants were alleged to have authority to en-

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(Footnote continued from preceding page)

vate entity had become imbued with state action, or upon whether a particular defendant was a "person" under section 1983, or upon liability for damages. *See Monell* v. *Department of Social Services*, 436 U.S. 658 (1978); *Flagg Brothers, Inc.* v. *Brooks*, 436 U.S. 149 (1978); *Imbler* v. *Pachtman*, 424 U.S. 409 (1976); *Rizzo* v. *Goode*, 423 U.S. 362 (1976); *Addickes* v. *S.H. Kress and Company*, 398 U.S. 144 (1970); *Monroe* v. *Pape*, 365 U.S. 167 (1961). In such cases, the establishment of an affirmative governmental action injurious to plaintiff is critical. The issues in those cases are not present here, because petitioners are all public entities or officials, and damages are not at issue.

> force the Code. Plaintiffs sought a *declaration* that defendants had violated their First and Fourteenth Amendment rights to gather, publish and receive factual information concerning attorneys practicing in Arlington County, and a permanent *injunction* against the enforcement and operation of DR 2-102(A)(6)."

Id. at 726 (emphasis added). No action whatsoever had been taken or threatened by any defendant to enforce the Disciplinary Rule in question, and no such action had even been alleged. *See, e.g., Consumers Union of the United States, Inc.* v. *American Bar Association,* 505 F. Supp. 822, 282 (E.D. Va. 1981) (Warringer, J. dissenting in part on remand).

Defendants in *Consumers Union* objected to the plaintiffs' section 1988 fee application, but the lower court held the Virginia Supreme Court and its Chief Justice liable for attorney's fees, in part because that Court had declined to amend the Disciplinary Rule to "conform with constitutional requirements". 446 U.S. at 729. The issue before this Court was whether the Virginia Court and its Chief Justice were immune from an award of attorney's fees under 42 U.S.C. §1988. This Court held that for judicial or legislative acts, the defendants were absolutely immune from suits for damages under section 1983 and from any award of attorney's fees under section 1988. *Id.* at 738. However, this Court went on to devastate both of petitioners' present arguments: that section 1983 does not provide *declaratory* relief, Petition at 11-12, and that section 1983 is unavailable until defendants have exercised their enforcement authority. Petition at 14-16:

> "[W]e believe that the Virginia Court and its chief justice properly were held liable in their enforcement capacities. . . . For this reason the Virginia

> Court and its members were proper defendants in a suit for *declaratory and injunctive* relief, just as other enforcement officers and agencies were."
>
> "If prosecutors and law enforcement personnel cannot be proceeded against for *declaratory* relief, putative plaintiffs would have to await the institution of state-court proceedings against them in order to assert their federal constitutional claims. This is not the way the law has developed, and, because of its own inherent and statutory enforcement powers, immunity does not shield the Virginia Court and its chief justice from suit in this case."

Id. at 736-737 (emphasis added).

In *Consumers Union,* this Court reversed the award of attorney's fees only to the extent that it "was premised on acts or omissions for which appellants enjoyed absolute legislative immunity", 446 U.S. at 738, and remanded for determination of whether fees were warranted in defendants' enforcement capacity. *Id.* at 739. This Court's holding directly contradicts petitioners' claim at 11-12 that Congress did not intend a section 1983 judgment or a section 1988 award where plaintiffs-respondents obtained declaratory and injunctive relief preventing enforcement of an unconstitutional law. Plaintiffs-respondents still acted as private attorneys general at their own expense to vindicate federally guaranteed rights; *when* they sued is immaterial to the Congressional policy underlying section 1988.

The Petition (at 19) raises the same spectre of numerous section 1988 awards in New Jersey which this Court rejected in *Consumers Union*:

> "Fee awards against enforcement officials are run-of-the-mill occurrences, even though, on occasion, had a state legislature acted or reacted in a differ-

> ent or more timely manner, there would have been no need for a lawsuit or for an injunction. Nor would we disagree had the District Court awarded fees not only against the Bar but also against the Virginia Court because of its own direct enforcement role."

446 U.S. at 739. Petitioners' fear that section 1988 would subject the State of New Jersey to substantial financial responsibility if the State Legislature persists in passing unconstitutional statutes, also has been rejected by this Court as a permissible basis for denying fees. *Hutto* v. *Finney,* 437 U.S. 678 (1978).

The Petition, at 17, quotes at length from the dissenting memorandum of the Chief Justice, in which Justice Rehnquist joined, from the denial of certiorari to the Court of Appeals for the Fourth Circuit in *Consumers Union of the United States, Inc.* v. *Virginia State Bar,* 688 F.2d 218 (4th Cir. 1982), *cert. denied,* —— U.S. ——, 103 S.Ct. 3124 (1983). That quotation in dissent makes it especially clear that the majority of this Court has held that a section 1988 award "may be premised solely on the existence of enforcement authority." —— U.S. at ——, 103 S.Ct. at 3127.

C. There are no "special circumstances" which would render "unjust" an award of attorney's fees to respondents in this case.

The Petition, at 20-21, acknowledges that since the "special circumstances" doctrine was established by *Newman* v. *Piggie Park Enterprises, Inc.,* 390 U.S. 400, 402 (1968), prior to the enactment of 42 U.S.C. §1988 in 1976, that doctrine has been so narrowly circumscribed as to be useless to defendants in section 1988 cases. This is not, as the Petition at 21 suggests, the case to revive that doctrine.

There has been as yet no award of fees to respondents on remand from the New Jersey Supreme Court, so it is literally impossible to determine whether the award in this case is "unjust". Moreover, petitioners' suggestion that they "assumed a passive stance with respect to enforcing" the unconstitutional law, Petition at 18, 22, is misleading in the extereme. According to the New Jersey Supreme Court, "[i]mmediately prior to the law's effective date, July 29, 1980, almost 2000" unpaid, part-time public officials "resigned their public offices to avoid the Law's prohibitions". 95 N.J. at 490, 472 A.2d at 139 (Appendix M at 95a). Petitioners, who could have filed their own action to declare the law unconstitutional and to enjoin its enforcement, instead defended this action with vigor. There is no evidence in the record below "that the defendants at all times acted in good faith." Petition at 22. In any event, the good faith or bad faith of defendants in section 1983 actions or on section 1988 applications is immaterial. *Maine* v. *Thiboutot,* 448 U.S. 1, 5 (1980); *Owen* v. *City of Independence,* 445 U.S. 622, 649 (1980).

CONCLUSION

The New Jersey Supreme Court properly followed this Court's decisions in deciding this matter in favor of respondents. Respondents prevailed below in vindicating important rights protected by the Constitution of the United States, and obtained all of the injunctive and declaratory relief they had sought, against each of the petitioners. Respondents therefore were entitled to an award of attorney's fees and costs under 42 U.S.C. §1988, and to favorable judgment under 42 U.S.C. §1983, and the New Jersey Supreme Court properly so held.

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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